

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 25, 2002

STATE OF TENNESSEE v. JOE A. GALLAHER

Appeal from the Criminal Court for Anderson County
No. 99CR074A James B. Scott, Jr., Judge

No. E2001-01876-CCA-R3-CD
June 25, 2003

The defendant, Joe A. Gallaher, was convicted by an Anderson County Criminal Court jury of first degree felony murder. Upon finding that the defendant knowingly committed, solicited, directed, or aided in the murder while having a substantial role in attempting to commit robbery, the jury sentenced the defendant to life without parole. See Tenn. Code Ann. § 39-13-204(i)(7). The defendant appeals, claiming that (1) his confession should have been suppressed, (2) photographs of the victim before and after his death should have been excluded from the evidence, (3) a surveillance videotape of the offense and a transcript of the recording should have been excluded, (4) the jury should have been instructed on the offense of facilitation of first degree murder, (5) the jury should not have been instructed that lesser included offenses should only be considered if it found the defendant not guilty of first degree murder, (6) the jury should not have been instructed that a participant in a robbery is guilty of felony murder if a death ensues, and (7) the evidence is insufficient to prove the aggravating circumstance. We affirm the conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

J. Thomas Marshall, Jr., District Public Defender, for the appellant, Joe A. Gallaher.

Paul G. Summers, Attorney General and Reporter; Thomas E. Williams, III, Assistant Attorney General; James N. Ramsey, District Attorney General; Janice G. Hicks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The case relates to the killing of Fred Brown at his used car business, F & G Sales, in Clinton, around 5:30 p.m. on February 17, 1999. The evidence reflects that the victim and an employee, Robbie Phillips, were in the office when two men, later identified as the defendant and his cousin, Mark Griffin, entered. The two believed that the victim was carrying a large sum of

money and tried to rob him. When the victim refused to give them any money, Griffin shot him twice and hit him in the head. The defendant taped Phillips' hands and knocked him unconscious.

A security video camera recorded the perpetrators approaching and entering the building. It recorded the sound of the events that occurred around the shooting. The recording cassette had been removed by the perpetrators and was found at another location. After being shown the videotape recording, the defendant admitted taking part in the robbery.

I. SUPPRESSION OF CONFESSION

The defendant contends that his confession was obtained in violation of his Fifth Amendment rights because it was not voluntarily given and was obtained after he requested counsel. The defendant mainly relies upon his testimony at the suppression hearing. He testified that the police roused him out of bed, took him to the station in the cold without a shirt, told him that he had to talk to them, and ignored his several requests for a lawyer. The state responds that the testimony of the Clinton City police officers shows that the defendant was treated properly; was advised of his Miranda rights, which he waived in writing; and never requested an attorney.

The trial court found that the police gave proper Miranda warnings, that the circumstances as a whole showed that the defendant's will had not been overborne, and that his statement was voluntary. The trial court noted that the police furnished the defendant a shirt and blanket and a soft drink and cigarette at the defendant's request. It also relied upon the defendant's familiarity with the justice system, given his prior history.

Relative to the defendant's claims, we note that the trial court's findings of fact in a suppression hearing are binding on us unless the evidence preponderates against them. See State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). In this respect, questions of witness credibility, the weight and value of evidence, and conflicts in the evidence are matters to be resolved by the trial court as the trier of fact. See State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000).

Clinton Police Captain David Queener and Sergeant Eldridge Douglas testified regarding advising the defendant of his Miranda rights, his acknowledgment of the rights, and his waiving those rights in writing. When the defendant said he was cold, they obtained a shirt and a blanket for him. They observed the defendant to be calm and not intoxicated. They acknowledged showing the videotape to him and his subsequent crying a little. However, they denied that the defendant ever requested a lawyer or was coerced. Sergeant Douglas stated that the only promise made to the defendant was that they would tell the District Attorney General's office that he cooperated, which Sergeant Douglas said they did.

The trial court's findings necessarily accredited the officers' testimony. Based upon our view that the record supports the trial court's findings, we conclude that the defendant's statement was properly admitted into evidence.

II. PHOTOGRAPHS OF VICTIM

The defendant complains about the state's use of two photographs of the victim after his death and one of the victim when he was alive and well. The state responds that the photographs were relevant to the issues on trial and that, in any event, the defendant waived any claim regarding the victim's photograph before his death because he did not object.

To be admissible, a photograph must be relevant to some issue at trial and the danger of unfair prejudice, confusion of the issues, or misleading the jury must not substantially outweigh its probative value. See Tenn. R. Evid. 403; State v. Banks, 564 S.W.2d 947, 949-50 (Tenn. 1978). The determination of the admissibility of photographs lies within the sound discretion of the trial court. See State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992).

A. Photographs After Death

_____The defendant complains about a photograph showing the victim's bloody head and one showing a foot with an identification toe tag bearing the name Fred Brown. At the trial, Dr. Cleland Blake, who performed an autopsy on the victim, identified the foot and toe tag relative to the victim and described the wounds reflected in the photograph. In fact, Dr. Blake attributed the victim's immediate cause of death to his blunt force injuries, not the gunshots. The trial court found that the bloody head photograph was relevant to show the victim's wounds and that it was not a gruesome picture, the victim having been cleaned. As for the foot photograph, the trial court determined that it was relevant to Dr. Blake's testimony and the identity of the victim as the subject of the autopsy. The trial court concluded that neither photograph was inflammatory.

The defendant argues that the bloody head photograph is gruesome and inflammatory and was unnecessary because of Dr. Blake's description of the wounds received by the victim. He argues that the foot photograph is simply irrelevant and inflammatory. We respectfully disagree with the defendant's stance.

The photograph of the head was relevant to show the cause of death because of the head trauma. The fact that the defendant did not actively contest the cause of death diminishes the need for such evidence, but it does not remove the need entirely. The defendant did not offer to stipulate either the cause of death or the identity of the person upon whom Dr. Blake performed the autopsy. On the other hand, given the evidence presented at the trial, we do not believe that the photographs presented a danger of unfair prejudice that substantially outweighed their probative value. The trial court did not err in admitting the photographs into evidence.

B. Photograph Before Death

The defendant complains about a photograph depicting the victim and a friend of his in a boat. The state had the victim's widow identify the victim in the picture. The photograph was then

passed to the jury. The defendant argues that the photograph was irrelevant and was calculated to play upon the sympathy of the jury.

The state claims that the defendant has waived this issue because he failed to object when the photograph was admitted into evidence and subsequently used the photograph in his cross-examination of Mrs. Brown. However, the record reflects that the defendant raised the issue before the trial began and that the trial court essentially denied the defendant's request to exclude the photograph. We believe that the ruling was sufficiently clear that further objection at the trial was not necessary. See Goines v. State, 572 S.W.2d 644, 649 (Tenn. 1978). Also, we do not believe that the defendant must ignore the photograph that was admitted over his objection in order to preserve the issue of admissibility. Thus, the defendant has not waived this issue.

The defendant asserts that the concept of whether or not the victim was a "reasonable creature in being" does not apply under current Tennessee law and that there was no issue as to the victim's identity. In State v. Nesbit, 978 S.W.2d 872, 901-02 & n.2 (Tenn. 1998) (appendix), the supreme court adopted this court's conclusion that although the requirement of a "reasonable creature in being" has been removed from the current criminal code, admission of a family portrait of the victim was not error because it was relevant to establish the corpus delicti, including the question of the identity of the person alleged to have been killed. In State v. Dicks, 615 S.W.2d 126, 128 (Tenn. 1981), the defendant objected to the state's use of "before and after" photographs of the victim, claiming they were without relevance and were prejudicial. The court stated that it found no prejudicial error in the admission, "though it would have been better had the 'before' picture of [the victim] been excluded since it added little or nothing to the sum total of knowledge of the jury." Again, we note that the defendant did not stipulate to the corpus delicti and the identity of the victim as the person alleged to have been killed. Given the holding in Nesbit, we conclude that the trial court did not abuse its discretion in admitting the photograph.

III. VIDEOTAPE AND TRANSCRIPT

The defendant contends that the videotape was not properly authenticated and had been improperly altered in the way it was spliced together. He also asserts that the transcript of the videotape recording was never properly authenticated. The state responds that the defendant has waived consideration of this claim because he failed to raise a contemporaneous objection to admission of the tape at trial. We, too, fail to find an objection or appropriate motion to strike by the defendant during the trial. If the defendant had raised any concern he presently has during the trial, the state would have been given the opportunity to obviate those concerns. Raising the claims now is too late. Relief need not be given to a party who fails to take reasonable action to prevent or nullify the effect of a supposed error. T.R.A.P. 36(a).

In any event, we see no error. As the state points out, Robbie Phillips, one of the robbery victims, testified about the incident and the camera's operation during the incident. He also stated that the videotape fairly and accurately portrayed the events constituting the robbery and murder. Thus, the reliability of the videotape was proven. As for the transcript, Captain David Queener

testified regarding his familiarity with the voices of the people on the recording. He said that the transcript accurately reflected the dialogue on the recording. There is no merit to this issue.

IV. INSTRUCTION ON FACILITATION OF FELONY MURDER

The defendant contends that the trial court erred in refusing to instruct the jury regarding facilitation relating to felony murder. He notes that our supreme court has held that facilitation of a felony was a lesser included offense of felony murder. State v. Ely, 48 S.W.3d 710, 719-20 (Tenn. 2001). He also acknowledges that the court determined that the facts in Ely did not warrant a facilitation instruction. 48 S.W.2d at 724. However, he tries to distinguish Ely from his case. We believe he fails in that endeavor.

In Ely, the court determined that an instruction was unnecessary as follows:

While there was some question as to whether it was Carden or Ely who actually killed the victim, the evidence was clear that the commission of the underlying felony of robbery was a joint undertaking. Ely's defense was that he was not present; therefore, he was either guilty of some degree of homicide or wholly innocent of any wrongdoing. Applying the Burns analysis to the evidence in this case to determine whether facilitation of felony murder should have been instructed, we find that no reasonable juror could have believed that although Ely was present, knew that Carden intended to commit the robbery, and furnished substantial assistance in the commission of the robbery, he nevertheless did not intend to "promote or assist the commission of the offense or to benefit in the proceeds or results of the offense." Therefore, no instruction on the lesser included offense of facilitation was warranted. See [State v. Burns, 6 S.W.3d 453, 470-71 (Tenn. 1999)] (stating that where the facts were susceptible to only two interpretations, neither of which encompassed a theory of facilitation, no instruction on the lesser-included offense of facilitation was warranted).

48 S.W.3d at 724. The defendant asserts that the evidence is just as susceptible of being interpreted that he facilitated Griffin's robbery and killing as that he promoted the offense or intended to benefit in the proceeds. He states that the recorded comments attributed to him indicate that he was more of a facilitator than a principal. We view the evidence differently. Given the undisputed evidence—other than, possibly, identity—that the defendant bound Robbie Phillips' hands with tape and knocked him unconscious, we see no reasonable basis for a jury to question that the defendant was anything other than a principal or aider and abettor. Moreover, as the state points out, the videotape recording reflects that a person states, "Shoot him, shoot him," just before the victim was shot. The state asserts that the voice was Griffin's, thereby indicating that the defendant had a gun during the robbery. The state notes that if the voice was not Griffin's, then the defendant was the

person directing the shooting. We conclude that the trial court did not err in refusing to instruct the jury regarding facilitation.

V. SEQUENTIAL INSTRUCTIONS

The defendant contends that the trial court erred in giving sequential jury instructions, i.e., the jury was not to consider a lesser included offense unless it acquitted the defendant of the greater offense first. He asserts that insufficient authority exists for such an instruction and argues that it violates his right to trial by jury. In this respect, he contends that the instruction contravenes Tenn. Code Ann. § 40-18-110(a), in effect at the time of his offense,¹ which provided that the trial court was to instruct the jury as to the law of each offense included in the indictment.

The defendant acknowledges that this court has held that sequential instructions are proper. See State v. Raines, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994); State v. McPherson, 882 S.W.2d 365, 375 (Tenn. Crim. App. 1994); State v. Rutherford, 876 S.W.2d 118, 119-20 (Tenn. Crim. App. 1993); State v. Christopher S. Beckham, No. 02C01-9406-CR-00107, Shelby County (Tenn. Crim. App. Sept. 27, 1995), app. granted and case remanded on other grounds (Tenn. July 8, 1996). However, he asserts that no authority is cited in these cases to allow such instructions. Also, he states that the Tennessee Supreme Court has “acquiesced in this Court’s approval of the sequential instruction by not commenting on the question” in State v. Mann, 959 S.W.2d 503 (Tenn. 1997). We note that the court affirmed this court’s ruling on sequential instructions and published that part of this court’s opinion as an appendix. Id. at 517, 521.

We acknowledge that this court’s opinions do not contain separate authority for holding that sequential instructions are proper. And we acknowledge that some jurisdictions see due process problems relating to sequential instructions based on the wording of certain murder and manslaughter instructions. See Edge v. State, 414 S.E.2d 463, 466 (Ga. 1992); Falconer v. Lane, 905 F.2d 1129, 1136-37 (7th Cir. 1990). However, the defendant ignores the importance of the present state of the law in Tennessee. We are bound by published precedent. See Tenn. S. Ct. R. 4(H)(2). Moreover, we view the supreme court’s publication of parts of this court’s opinion in Mann as an appendix to mean more than the court’s acquiescence in this court’s opinion. Therefore, based on controlling authority, we conclude that the trial court did not err in giving sequential instructions.

VI. FELONY MURDER INSTRUCTION

The defendant contends that the trial court’s instructions essentially directed the jury to return a guilty verdict and were improper comments on the evidence. The state responds that the instruction in issue is supported by the evidence, is a correct statement of the law, and has been previously approved by this court.

At the request of the state, the trial court instructed the jury as follows:

¹The legislature amended Tenn. Code Ann. § 40-18-110 in 2001.

When one enters into a scheme with another to commit a robbery and death ensues, all the robbers are responsible for the death regardless of who actually committed the murder and whether the killing was specifically contemplated by the other. No culpable mental state is required for a conviction of this offense except the intent to commit Aggravated Robbery.

The instruction was given immediately after the listing of the elements of felony murder and before describing the elements of aggravated robbery.

The defendant argues that the instruction contradicted the instruction on criminal responsibility and confused the jury as to what the state had to prove to support a verdict of guilty. He also claims that the instruction does not tell the jury to what degree of homicide it applies.

First, we note that the instruction is a statement of law that has been approved in Tennessee for felony murder that requires no mens rea for the killing. See State v. Hinton, 42 S.W.2d 113, 119 (Tenn. Crim. App. 2000); State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App. 1988). In Brown, the jury asked whether a person aiding and abetting in the felony only, not the murder, would be guilty of felony murder. The trial court advised the jury that if it found “beyond a reasonable doubt that a defendant was aiding and abetting in the felony, which is the foundation of the charge of felony murder, then he would be guilty of felony murder itself.” In approving this instruction, this court stated:

When one enters into a scheme with another to commit one of the felonies enumerated in TCA § 39-2-202 and death ensues, both defendants are responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the other.

756 S.W.2d at 704. We cannot fault an instruction on an applicable, correct principle of law unless, in context, it is confusing or misleading.

In context, we do not believe that the instruction risks confusing or misleading the jury. The instruction was given immediately after the instructions for felony murder regarding the need for the jury to find that the killing was closely connected to the alleged aggravated robbery and that the defendant intended to commit the alleged aggravated robbery. The trial court also referred the jury to the elements of aggravated robbery which were required to be proven by the state beyond a reasonable doubt in order for the jury to convict on felony murder. We agree with the state that there was no risk that the jury could have interpreted the questioned instruction as allowing for a conviction for felony murder without a proper finding regarding aggravated robbery. Similarly, we see no confusion regarding lesser included homicides. In context, the instruction relates to felony murder, only. We conclude that the instruction was not improper as given.

VII. AGGRAVATING CIRCUMSTANCE

The defendant contends (1) that the trial court erred in refusing to modify his sentence to life with parole because the state failed to give notice of the aggravating circumstance it would put forward during sentencing and (2) that the evidence was insufficient to prove the factor proposed by the state. Regarding notice, the state's notice phrased the aggravating circumstance as: "The murder was knowingly committed or aided by the defendant while the defendant had a substantial role in committing a robbery." The pertinent statutory provision reads:

The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, any . . . robbery

Tenn. Code Ann. § 39-13-204(i)(7). The trial court instructed the jury relative to the statutory language.

The defendant first complains that the instruction expanded the aggravating circumstance above that contained in the state's notice. In response, the state asserts that the defendant either had actual notice or waived his claim that he was prejudiced by the limited notice. It notes that the state's notice cited the applicable statute and that the defendant was provided a copy of the proposed jury instructions for the sentencing phase. There is no indication in the record that the defendant complained of or was surprised by the use of the full language of the statute. In fact, we note that the defendant made no specific complaint regarding the notice or the instruction in his motion for new trial. We agree with the state that such a claim is waived.

Regarding the sufficiency of the evidence for the aggravating circumstance, "the proper inquiry for an appellate court is whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt." State v. Suttles, 30 S.W.3d 252, 262 (Tenn. 2000). The defendant asserts that the state failed to prove beyond a reasonable doubt that the defendant knowingly committed or knowingly helped in the killing. He points to one of his comments to the police that the events were not supposed "to go down that way." He also relies upon the limited comments attributed to him on the videotape. The state responds that the evidence supported the inference that, at least, the defendant brandished a gun during the robbery because Griffin was reported to have stated, "Shoot him, shoot him," just before the victim was shot. The state notes, as well, that although the accuracy of the videotape's transcript was uncontested at trial, if the voice urging the shooting was not Griffin's then the defendant was the person urging the shooting. Also, we believe it is significant that the defendant said, "Robbie's gonna die" after the wounded victim asked Robbie Phillips to get help. We conclude that the evidence was sufficient to support a finding that the murder was knowingly committed, solicited, directed, or aided by the defendant.

In consideration of the foregoing and the record as a whole, we affirm the judgment of conviction.

JOSEPH M. TIPTON, JUDGE